

ORIGINAL CIVIL.

Before Mr. Justice Batchelor.

SHAPURJI BEZONJEE MOTIWALLA (PLAINTIFF) v. DOSSABHOY
BEZONJEE MOTIWALLA AND OTHERS (DEFENDANTS).*

1905.

December 9.

Parsi Intestate Succession Act (XXI of 1865)—Law governing Parsees in the mofussil before the introduction of the Act—Rules of equity and good conscience—Practice of English Equity Courts.

Before the passing of the Parsi Intestate Succession Act, 1865, the law governing Parsees in the mofussil was the ascertained usage of the community modified by the rules of equity and good conscience. It is true that in such cases the practice of the English Equity Courts would also be followed with necessary modifications, but the reference to these Courts would be not for the purposes of introducing special or peculiar doctrines of English law, but rather with the purpose of elucidating the principles of equity and good conscience and of giving uniform effect to them.

Before the passing of the Succession Act a Parsee husband did not acquire that particular right which in English Law accrued to a husband over his wife's personalty.

ORIGINATING SUMMONS.

One Aimai *alias* Bachoobai died at Bombay on the 25th April, 1886, leaving her surviving two daughters: Goolbai and Motibai. Prior to the 4th March, 1865, (the day on which the Parsi Intestate Succession Act, XXI of 1865, was passed), Goolbai was married to Shapurji Bezonji Motiwalla (plaintiff) and Motibai to Dossabhoj Bezonji Motiwalla (defendant No. 1).

At or before the respective marriages of Goolbai and Motibai, their relations made to them and their husbands the customary presents which belonged in accordance with the custom of the Parsee community to the said Goolbai and Motibai and their husbands as joint tenants. The said presents were allowed by Goolbai and Motibai and their husbands to remain with Aimai.

Aimai, before her death, made a will, probate whereof was, on the 8th September, 1886, granted by the District Court of Poona to Goolbai and Motibai, executrices of the will.

The clauses of the will material to the present report ran as follows:—

"5. A large sum of money has been claimable from me about 21 years past in respect of customary presents and presents from the house of the parents-in-

* O. C. J. Suit No. 473 of 1905, O. S.

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law in connection with the marriage of my daughters and sons-in-law and for presents on other auspicious occasions. In return (in consideration thereof) and in consideration of my love as mother, I give (bequeath) in equal shares to my two daughters the said Motibai and Goolbai for their personal and special use my immoveable properties which are situated in the camp at Poona and the particulars whereof are as follows.....To the same the claim of their husbands and of their creditors shall not prevail at all.

"7. Should the death of either of my two daughters take place which may God forbid and should she have children or issue then the inheritance and share coming to her portion shall remain in the hand of her husband and the same shall be divided in equal shares to the children of the deceased when they attain the age of 21 years but should any such deceased daughter have no issue then the income appertaining to her share or portion shall be paid to her share or portion should he be alive and the present and subsequent husband of the said daughter shall not be at all entitled to the principal but on his decease taking place my other surviving daughter and her heirs shall duly get the said principal. To the same no other person has any right whatever."

In 1886, the executrices, Motibai and Goolbai, sold one of the immoveable properties which had been mortgaged to the mortgagee and thereafter divided the income of the remaining two properties in equal shares between themselves.

Motibai died on the 17th April, 1891, intestate and leaving her surviving the defendants, her husband, sons and daughters as her sole heirs. After her death, the income of the property was divided between Goolbai and the husband of Motibai in equal shares.

Goolbai died on the 24th August, 1900, intestate and without issue, leaving the plaintiff, her husband, her sole heir.

After the death of Goolbai, the two remaining properties left by Aimai were sold by the plaintiff and the defendants: and the proceeds were invested in Government paper. Then there arose a difference of opinion between the plaintiff and the defendants about this money: the plaintiff contended that under the will of Aimai and in the events which had happened Goolbai and Motibai took absolute interests as tenants-in-common in equal shares of the said property and that on the death of Goolbai the plaintiff became entitled absolutely in his marital rights or as her heir to her moiety; and the defendants contended that the plaintiff was only entitled to a life-interest in a moiety of the income of the said property.

To settle this dispute, the plaintiff took out an originating summons on the 6th July, 1905, for the determination of the following questions:—

1. Who are the persons now entitled to the property in the plaint specified and now representing the property devised by the clauses of the will of Aimai in the plaint set out.
2. What interests and in what shares the persons entitled to the property take the same.
3. Whether the said property or any and what parts thereof is now distributable among the parties to this suit.
4. If so, how is the same distributable.
5. What provision should be made for the costs of this suit and Originating Summons.

Raikes and *Lowndes*, for the plaintiff.

Inverarity and *F. S. Taleyarkhan*, for defendants 2 to 6.

BACHELOR, J.:—This was an originating summons which has been remanded into Court.

Before the coming into operation of the Parsee Succession Act, 1865, or of the Indian Succession Act, one Gulbai, the daughter of Aimai, was married to the plaintiff. Aimai made her will in which she left the property in dispute to the separate use of Gulbai. This property consists of certain lands at Poona and Aimai and her husband were residents of Poona. Aimai died in 1886, when the Succession Acts were in force. Gulbai died intestate in August, 1900, leaving her husband, the plaintiff, and certain nephews.

It is admitted that the plaintiff is entitled to one moiety of the property. But he claims the whole share of Gulbai, and the question is whether he is entitled to it.

As I understand the argument of Mr. Raikes for the plaintiff, the claim is sought to be substantiated in this way. The plaintiff's marriage with Gulbai took place before the Succession Acts of 1865 came into operation, and at that time the law applicable to mofussil Parsees was the English law. But land in the mofussil of India is to be regarded as personalty, not realty; therefore, following the law of England, plaintiff was entitled in law to this property as his wife's personalty, and in equity was trustee on her behalf until her death. On her death without disposing of the property, her separate use was exhausted

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and the plaintiff became the beneficial owner. In support of these contentions reference is made to *In re Lambert's Estate, Stanton v. Lambert* ⁽¹⁾.

In my opinion there are several answers to the argument. Admittedly the Succession Act was in operation when the testatrix Aimai died. Mr. Raikes replies that that Act cannot divest rights already vested before it came into force; and that no doubt is so. But the question is, had any rights vested in plaintiff before Aimai's death? I should answer, no. The only rights accruing to Gulbai or the plaintiff accrued under Aimai's will, and that speaks from her death: until that event Gulbai had a mere *spes successionis*. The right was acquired when Aimai died, but then it was subject to the Parsee Succession Act.

Next, I am not satisfied that English law was the law governing the parties before 1865, at least for the purposes required by the plaintiff's argument. The decisions in *Mithibai v. Limji Nowroji Banaji* ⁽²⁾ and *Jehangir Dhanjibhai Surti v. Perozbai* ⁽³⁾ are authorities for the view that, before the Act, the law governing Parsees in the mofussil was the ascertained usage of the community modified by the rules of equity and good conscience. It is true that in such cases the practice of the English Equity Courts would also be followed with necessary modifications (see *Mancharsha v. Kamrunisa Begam*) ⁽⁴⁾, but I take it that the reference to these Courts would be not for the purposes of introducing special or peculiar doctrines of English law, but rather with the purpose of elucidating the principles of equity and good conscience and of giving systematic and uniform effect to them. But whether the doctrine be expressed in the language used in *Mancharsha's* case or in that used in the other cases I have cited, the result appears to me to be that, prior to the introduction of the Succession Acts, no Court would have held that a Parsee husband acquired that particular right which in English law accrued to a husband over his wife's personalty. Such a question as this would, I think, have been decided in the case of a mofussil Parsee not by any technical principle of English law, but by the custom and usage of the community, and it is not alleged

(1) (1888) 39 Ch. D. 626.

(3) (1886) 11 Bom. 1 at p. 4.

(2) (1881) 5 Bom. 506.

(4) (1868) 5 Bom. H. C. R. (A. C. J.) 100.

that the plaintiff has any valid claim under this test. The division of property into 'personalty' and 'realty', as those terms are understood by English lawyers, is not a division which, so far as I am aware, was recognised in the Indian mofussil, and I am shown no authority to indicate that any such recognition was accepted by the Courts. In early days Parsees in Presidency towns were held to be governed by the English law of real property, but this was felt to be a grievance, and was partially removed by Act IX of 1837. That Act was not extended to the mofussil, and the reason appears to be that the Courts had never enforced this branch of English law outside the Presidency towns. Mr. Raikes contends that the non-extension of the Act of 1837 to the mofussil may be explained by the theory that land in the mofussil was always considered to be descendible as personalty; but no decisive authority is cited to sustain this theory, and I prefer the view that the non-extension was due to the fact that among Parsees in the mofussil the special doctrines of the English law of real property were never held to govern.

Thus the plaintiff's claim, as it seems to me, is grounded upon a doctrine of English law which both was and is inapplicable to the parties and the property in suit. The claim must, therefore, be dismissed.

The answers to the questions in the summons will be:

(1) Not answered as to Motibai. As to Gulbai, plaintiff entitled to one half as admitted; the other half to go to defendants 2 to 6.

(2) As above.

(3) Gulbai's share is distributable as above, and defendants 2 to 6 are to have the other half.

(4) As above.

(5) As to costs I order under Rule 261 that the costs be taxed on the same scale as a long cause. Two counsel certified. I think plaintiff must pay for his losing experiment, and must bear all costs.

Attorneys for the plaintiff: *Messrs. Mirza & Mirza.*

Attorneys for the defendants: *Messrs. Kanga & Patel.*

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